Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 26 2010
SRC 08 009 56666

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an attorney specializing in immigration law. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief, witness letters, and exhibits relating to his most recent activities. The petitioner states: "Section 103.2(b)(8) of the act requires The Service to issue a request for additional evidence . . . when additional evidence is missing." The petitioner refers, here, to a provision in U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.2(b)(8); the petitioner mistakenly refers to this regulation as a section of the Act. An older version of the cited regulation required that, if "initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence." USCIS revised that regulation, however, before the petitioner filed his petition. *See* 72 Fed. Reg. 19100 (June 18, 2007). The current regulation at 8 C.F.R. § 103.2(b)(8)(ii) states: "If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS."

Because the issuance of a request for evidence is discretionary, and has been so throughout this proceeding, we can find no error in the director's decision not to issue such a notice. We will give due consideration to new evidence submitted on appeal.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 27, 2007. In an accompanying statement, the petitioner asserted that, while there are many capable immigration attorneys in the United States, most "come from a society that is not remotely close to that of" their clients, which can result in communication problems. The petitioner asserts that, by having studied and earned degrees both in the United States and in his native Venezuela, he has a better understanding of "the reasoning behind why many Immigrants from Latin America and across the world would venture into the United States seeking for a better future." Even if the petitioner's background gives him a better insight into the motivations of prospective immigrants, this does not explain why a waiver of the job offer requirement would be in the national interest. All intending immigrants are, by definition, from outside the United States, and their understanding of their native cultures does not broadly nullify or supersede the job offer requirement.

To show that he has been active in his field beyond representing individual clients, the petitioner submitted copies of three Spanish-language newspaper columns he wrote. The petitioner asserts that he has "written articles for the Immigrant Times, La Voz, [and] Hispanic Days," but the record does not identify the publication(s) in which the submitted articles appeared. The petitioner failed to submit certified translations of the documents as required by 8 C.F.R. § 103.2(b)(3). Therefore, the record does not establish the significance of these written pieces.

The petitioner also stated that he has made numerous media appearances. In support of this claim, he submitted two DVDs. One shows a ten-second appearance on CNN Espanol, with no translation or explanation of the context of the appearance. The other disc is not compatible with available AAO computer equipment and therefore we cannot comment on its content.

Letters from the American Bar Association (ABA) indicate that the beneficiary was a member of two committee steering groups of the ABA International Law Section in 2007-2008. The letters do not appear to offer clear descriptions of the beneficiary's responsibilities in these groups other than to state that "members of the Steering Groups . . . are all expected to actively and energetically lead their committees at all times." The petitioner's work with these committees, like his media exposure, lends national scope to his work. National scope is a necessary, but not sufficient, condition for the waiver.

[redacted], who was a private attorney before he "was hired by [redacted]. of the USCIS at the Department of Homeland Security," stated that the petitioner "has a distinctive character and an outstanding academic background. From our casual conversation, he demonstrated to me that he had remarkable knowledge of Immigration Law that would even embarrass some of the experienced practicing lawyers in New York City." General praise for the petitioner's skills does not provide a

strong basis for granting the waiver. As we have already noted, exceptional ability in one's field is not presumptive grounds for approving the waiver application.

The petitioner claims to have job offers from several law firms and the Spanish-language broadcast network Telemundo, but he asserts that they do not wish to file petitions or apply for labor certification on his behalf. The petitioner submitted no evidence to support these claims.

The director denied the petition on November 4, 2008. The director acknowledged the intrinsic merit of the legal profession and found that the petitioner's activities have national scope, but the director found that the petitioner had not submitted independent evidence of the importance and impact of the petitioner's work.

On appeal, the petitioner cites his work with professional groups and the media as evidence that he "has reached a certain status within the profession of law." While prominence in one's field provides opportunities to serve the national interest, prominence itself is not evidence that one's work has served or will serve the national interest. The petitioner states: "I have been regarded by many as one of the top Immigration Lawyers in the nation and a future leader of the United States," but this passive sentence does not identify who has regarded the petitioner in this way. It is simply a claim of a particular reputation.

The petitioner submitted materials relating to media appearances and professional activities in late 2007 and 2008, after the petition's July 2007 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot retroactively establish eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). As with the petitioner's initial submission, many of these materials are in Spanish with no translation, certified or otherwise. Some are in Chinese, again with no translation.

The petitioner has shown that he has participated in various panels and seminars, but he has not explained how these events (whether before or after the filing date) show that he qualifies for the national interest waiver. These events do not show what concrete effect his work has had on immigrants' rights, the practice of immigration law, or other factors relating to his work. His professional credentials do not, on their face, demonstrate eligibility for the waiver.

The petitioner submits several witness letters on appeal. [redacted] who has "worked closely [with the petitioner] in several different projects," states:

> I am confident and attest to his extraordinary ability in the field of U.S. Immigration Law, especially in Deportation and Removal Proceedings as well as in the area of Refugee & Asylum Law and defending victims of abuse under The Violence Against Woman [*sic*] Act. [The petitioner] is a high-profile figure in the U.S. Immigration Law field and is therefore well respected by his colleagues. He has achieved great

> success in practicing such field while helping many people in need all throughout the United States.
>
> [The petitioner] is presently the featured [*sic*] as an expert in U.S. Immigration Law in many televisions [*sic*], radio programs, newspapers and journals all throughout the United States. . . . He is truly the definition of "National Interest," due to his ability through these programs and his knowledge to reach audiences nationwide in a topic so diverse and important such as [*sic*] U.S. Immigration Law.

[redacted] in the letter quoted above, does little more than attest to the petitioner's credentials and activities in his field.

A letter from [redacted] contains no specific mention of the beneficiary's work. [redacted] thanks the petitioner for his past correspondence and suggests that he subscribe to the representative's e-newsletter. The letter has many features of a "form" letter rather than individual correspondence.

[redacted] of the Section of International Law at the ABA, discusses the petitioner's ABA activities after the 2007 filing date. His letter also contains the following paragraph:

> [The petitioner] has been a member of the ABA and the Section of International Law since 2003, having begun as a student member, and transitioning to lawyer status upon graduation from law school. [The petitioner] is an outstanding member of the Section. In addition to serving on 12 committees including a leadership role in the Young Lawyers' Interest Network, he is active in other Section activities including membership diversity initiatives in many parts of the world including Latin America, Africa and Asia.

The letter from another ABA official, [redacted] (director of membership), contains a very similar paragraph, shown below:

> [The petitioner] has been a member of the ABA and the Section of International Law since 2003 and began as a student member and transitioned to lawyer status upon graduation from law school. [The petitioner] is an outstanding member of the Section of International Law. In addition to serving on 12 committees including a leadership role in the Young Interest Network Committee, he also is active in other areas of the Section including diversity initiatives to increase Section membership among members of diverse groups and from around the world including Latin America, Africa and Asia.

The use of similar (at times identical) language in two different letters raises the question of who actually wrote those letters. In any event, the director did not base the denial on the perception that the petitioner was not active enough in ABA section activities.

[redacted], former president of the International Professional Association, offers the most specific discussion of the petitioner's past accomplishments. He states:

> [The petitioner] worked as my legal assistant for approximately 3 years at the International Professional Association. His work was outstanding and his contributions while there speak volumes of his ability. To his credit, he developed operating procedures for processing Reduction in Recruitment for U.S. Department of Labor Cases and operating procedures [for] newly introduced PERM cases also under the U.S. Department of Labor. This illustrates [the petitioner's] ability to create and implement innovative procedures. His creative thinking yielded significant increases in efficiency for such association [*sic*]. [The petitioner's] work has influenced the way immigration practitioners approach employment based strategies and case work.
>
> . . . He has represented clients throughout of [*sic*] the United States. He has appeared pro hac vice before the 2nd Circuit Courts [*sic*] and is presently pursuing a writ of Mandamus before the U.S. Supreme Court which if granted will re-define in some ways the standard for denying an affirmative political asylum (Asylum applied administratively, not while in proceedings).

[redacted] does not point to any documentary evidence to support the claims in his letter, nor does he identify the case that the petitioner hopes to take to the Supreme Court. Thus, while [redacted] credits the petitioner with specific influence in his field, the record offers no objective way to verify that influence.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

For reasons discussed above, the letters submitted on appeal are vague, uncorroborated, and/or irrelevant to the proceeding at hand.

In supplements to the appeal dated March 2 and July 22, 2009, the petitioner documents several media appearances and other activities that took place in the early months of 2009. The petitioner's activities in early 2009 show that he remains active in his field, but for reasons we have already explained, they cannot demonstrate that he was already eligible for the waiver in mid-2007 when he filed the petition.

The March 2009 supplement includes a letter from [redacted], who states:

> I have known [the petitioner] since 2007 through our cooperation in the American Bar Association's Section of International Law. We currently work together as vice-chairs in the Section of International Law's Young Lawyers Interest Network.
>
> [The petitioner] has proven time and again throughout his career that he is capable in assessing the needs and opportunities for his clients and future clients in the United States and I have the utmost confidence that he will continue to do so.

Like most of the earlier letters, [redacted] letter contains general praise for the petitioner's abilities but identifies no specific accomplishments to show that he qualifies for the waiver.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. The petitioner has shown that he is a very active and dedicated attorney, but the record offers little information about the petitioner's broader impact on the practice of immigration law. The petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.